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BRIEF

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No. 16-300

In the Supreme Court of the United States

ERNST & YOUNG LLP, ET AL., PETITIONERS

v.

STEPHEN MORRIS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The Court granted certiorari in these cases to resolve an alleged conflict between two federal statutes: the Federal Arbitration Act and the National Labor Relations Act. Yet one would hardly know it by reading the response briefs. According to the parties to those briefs (hereafter "respondents"), the Court need only interpret the NLRA "alone," "without any reference to" the Arbitration Act, in order "completely [to] resolve[]" the cases. Lewis Br. 34 (No. 16-285). Respondents consequently treat the Arbitration Act as an afterthought, relegating it to the back of their briefs.

That nearly exclusive focus on the NLRA may be understandable coming from the NLRB. But this Court has time and again made clear that federal courts should work to harmonize allegedly conflicting federal statutes unless Congress has clearly indicated that one should displace the other. In particular, the Court will not construe an ambiguous statute to conflict with a clear one when a reasonable, non-conflicting interpretation of the ambiguous statute is available.

Respondents seek to avoid that principle because they so clearly lose under it. There can be no dispute that Section 2 of the Arbitration Act contains a clear command to enforce arbitration provisions according to their terms—including, as this Court has repeatedly held, terms calling for individual arbitration. In light of that clarity, the Arbitration Act will yield to another federal statute only if the competing statute contains a similarly clear command precluding enforcement of the parties' agreement. This Court has repeatedly held that statutes that make ambiguous references to judicial proceedings or collective actions do not suffice. The NLRA contains no such clear congressional command; the Arbitration Act and this Court's cases thus mandate enforcement of the arbitration provisions at issue.

Respondents' attempts to avoid that well-established standard defy the plain language of the Arbitration Act and this Court's case law addressing similar alleged conflicts. But even if the NLRA were considered in isolation—which it decidedly should not be—it is best understood as leaving arbitration agreements and court rules for collective actions undisturbed, and as permitting covered employees to waive access to collective-litigation procedures and to agree to individual arbitration. The Ninth Circuit's decision invalidating the arbitration pro-

vision at issue here was incorrect, and its judgment should be reversed.

A. A Federal Statute Cannot Override The Arbitration Act's Clear Command To Enforce Arbitration Agreements According To Their Terms Unless It Contains A Clear Contrary Command

When a party asserts that a federal statute precludes enforcement of an arbitration agreement under the Arbitration Act, this Court asks whether the competing statute contains a clear congressional command contrary to the Arbitration Act's mandate to enforce arbitration agreements according to their terms. Given the deep-seated judicial hostility to arbitration, this Court has had no shortage of opportunities to make its methodology clear. See EY Br. 22-26 (No. 16-300) (citing cases). Respondents ignore that phalanx of authority and urge the Court to focus on the NLRA and the Arbitration Act's saving clause. But respondents offer no valid basis for the Court to abandon its well-established approach.

1. Like the court of appeals below, respondents suggest that the arbitration provisions here are unenforceable under the saving clause in Section 2 of the Arbitration Act because they are illegal under Section 7 of the NLRA. See Morris Br. 35-37 (No. 16-300); NLRB Br. 35-46 (No. 16-307); Lewis Br. 35-44 (No. 16-285); Hobson Br. 34-43 (No. 16-307). But every one of this Court's cases applying the clear-congressional-command standard could have been resolved by deeming the arbitration provision at issue illegal under the competing federal statute and then employing the saving clause to defeat arbitration. This Court has instead adhered to its traditional methodology and favored arbitration.

Even beyond that fatal defect, respondents have little answer for the proposition that, by its terms, the saving clause refers only to generally applicable defenses under

contract law: that is, "grounds * * * for the revocation of *any* contract." 9 U.S.C. 2 (emphasis added). Nor do respondents dispute that the saving clause has been understood by the Court not to provide the key for reconciling competing federal statutes, but to address state law, which ordinarily provides the rule of decision for contract cases and thus supplies those defenses. See EY Br. 33-37; U.S. Br. 29-33. The arguments respondents do make concerning the saving clause are unavailing.

a. Respondents note that saving clauses can sometimes cover federal law, whether explicitly or implicitly. See Morris Br. 36-37; NLRB Br. 44-45; Lewis Br. 38; Hobson Br. 40-41. That is surely true. For example, the "saving clause" at issue in *TC Heartland LLC* v. *Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017), stated that certain provisions in the general venue statute do not apply when "otherwise provided by law." *Id.* at 1521 (quoting 28 U.S.C. 1391(a)). Only federal law could "otherwise provide[]" under that statute, because federal law governs venue in federal court. See *Stewart Organization, Inc.* v. *Ricoh Corp.*, 487 U.S. 22, 25-32 (1988).

But saving clauses can also address only state law. And the relevant question is whether *this* saving clause can be triggered by a federal law such as the NLRA. That analysis naturally turns on the language and context of the clause itself. Here, the Arbitration Act's saving clause saves generally applicable contract defenses. State law provides the substance of contract law (except in rare circumstances) and thus supplies the types of generally applicable defenses the saving clause covers.

b. Perhaps recognizing the textual difficulty with respondents' argument, respondent Lewis suggests that he can accomplish in two steps what he could not accomplish in one. He argues that respondents can invoke the generally applicable state-law defense of illegality for

contracts that violate public policy and then have a federal statute supply that public policy via the Supremacy Clause. See Lewis Br. 37-38 n.7.

That argument is too clever by half. It is true that, under the Supremacy Clause, state courts must apply federal law when it establishes a rule of decision that conflicts with state law. See *Testa* v. *Katt*, 330 U.S. 386, 393-394 (1947). But it does not follow that federal law supplies the content for a state-law illegality defense; the Supremacy Clause provides only that federal law *preempts* state law in the event of a conflict. See *Armstrong* v. *Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1383 (2015). State courts therefore must *apply* federal law in some circumstances, but that does not mean they are obligated to incorporate federal law into state public policy.

Accordingly, respondents cannot shoehorn their argument into the saving clause by reconceptualizing it as a state-law illegality defense. At bottom, they are still relying solely on federal law. Sanctioning such a maneuver would contradict this Court's well-established methodology and open the way for parties to circumvent the requirement of a clear congressional command. See EY Br. 35-36.

c. In addition, the NLRB contends that its interpretation of the NLRA triggers the saving clause because, so interpreted, the NLRA "is neutral with respect to arbitration." NLRB Br. 37-44. That contention does not solve the problem that the saving clause applies only to generally applicable defenses under contract law—and it is in any event incorrect.

This Court considered and rejected a similar notion of "neutrality" in *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333 (2011). The plaintiffs there argued that the state-law prohibition on waivers of class arbitration was

neutral with respect to arbitration because state law "prohibit[ed] waivers of class litigation as well." *Id.* at 341. The Court rejected that argument, explaining that "requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration." *Id.* at 344. The Court observed that, while state law permitted claimants to opt for individual arbitration, the availability of collective-litigation procedures would drive them away from it, because there would be "little incentive for lawyers to arbitrate on behalf of individuals" when they could litigate on behalf of a class and "reap far higher fees in the process." *Id.* at 347.

So too here. Respondents' interpretation of the NLRA would require the availability of some form of collective litigation if an employment agreement provided for individual arbitration. See NLRB Br. 42. The natural result would be more litigation and less arbitration—hardly a "neutral" approach. See *id.* at 37.

2. As respondents all but concede, this Court's case law uniformly points away from their novel proposal to use the saving clause to evade the requirement of a clear congressional command contrary to arbitration. See Morris Br. 44-46; NLRB Br. 47-51; Hobson Br. 49-51. Respondents nevertheless contend that this Court's cases requiring a clear congressional command are distinguishable. Respondents are mistaken.

a. Respondents first contend that "none of th[e] congressional-command cases involved an agreement that was illegal because it violated a federal statute." NLRB Br. 47; see Lewis Br. 41. But that is exactly backwards: *every one* of those cases involved an allegedly illegal agreement, in the sense that the agreement was allegedly contrary to public policy reflected in the competing federal statute. Put another way, the party seeking to avoid arbitration in each of those cases argued

that some federal statute evinced a policy that precluded enforcement of the arbitration agreement at issue.

For example, in *CompuCredit Corp.* v. *Greenwood*, 565 U.S. 95 (2012), the plaintiffs argued that the Credit Repair Organizations Act forbade waivers of access to a judicial forum. See *id.* at 99. Likewise, in *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220 (1987), the plaintiff argued that the Racketeer Influenced and Corrupt Organizations Act forbade such waivers. See *id.* at 240. In both cases, the Court could have analyzed whether the agreements were "illegal"—*i.e.*, contrary to public policy as expressed by federal law. Instead, in each case, the Court searched—in vain—for a clear congressional command contrary to arbitration. See *CompuCredit*, 565 U.S. at 98; *McMahon*, 482 U.S. at 226-227.

b. Respondents next contend that this Court has applied the clear-congressional-command standard only when the party opposing arbitration argued that Congress was precluding arbitration entirely, rather than precluding a particular term in the parties' arbitration agreement. See Morris Br. 45-46; NLRB Br. 48-49; Hobson Br. 49-50.

American Express Co. v. *Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), rebuts that contention. The plaintiffs there accepted that antitrust claims generally could be arbitrated but nonetheless argued that the class-action waiver in that case could not be validly enforced without undermining the antitrust laws. *Id.* at 2308. This Court thus analyzed the antitrust laws not to determine whether they precluded arbitration entirely, but rather whether they contained a "congressional command" "contrary" to "the waiver of *class* arbitration." *Id.* at 2309 (emphasis added). The Court concluded that they did not. *Id.* at 2310.

More broadly, it would make little sense to apply the clear-congressional-command standard only when a federal statute allegedly precludes arbitration entirely. As this Court has explained, the text of the Arbitration Act requires "courts [to] rigorously enforce arbitration agreements according to their terms, including terms that specify *with whom* the parties choose to arbitrate their disputes and the rules under which that arbitration will be conducted." *Italian Colors*, 133 S. Ct. at 2309 (internal quotation marks, citations, and brackets omitted).

The procedural terms of arbitration often matter just as much as the fact of arbitration itself; after all, customization is one of the fundamental features of arbitration. See *AT&T Mobility*, 563 U.S. at 348-349. Altering those terms after the fact can undermine the parties' choice of arbitration just as much as denying arbitration altogether. See *id.* at 341-343. Applying the clear-congressional-command standard to the procedural terms the parties select honors Congress's adoption, through the Arbitration Act, of a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 24 (1983).

3. As an alternative to their reliance on the saving clause, respondents contend that, when an arbitration agreement requires a party prospectively to waive a "substantive" or "core" statutory right, the agreement is invalid. See Lewis Br. 44-47; Hobson Br. 43-49. That contention is unavailing.

As a preliminary matter, this Court has never squarely recognized an exception to the Arbitration Act's mandate where an arbitration provision either precludes a party from raising, or prevents a party from effectively vindicating, an underlying right. The idea of such an exception arose in dicta in a footnote, see *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S.

614, 637 n.19 (1985), and this Court has never invalidated an arbitration agreement on that basis, see *Italian Colors*, 133 S. Ct. at 2310 & n.2.

When the Court has discussed the possibility of such an exception, however, it has described it in narrow terms. In *Mitsubishi Motors*, where the idea first arose, the Court suggested that such an exception would apply to the waiver of a "statutory cause of action." 473 U.S. at 637. The Court has used similar terms in subsequent decisions. See, *e.g.*, *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 540 (1995); *Gilmer* v. *Insterstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991). So understood, such an "exception" would not really be an exception to the Arbitration Act's mandate at all. A contractual provision that precludes a party from pursuing (or effectively pursuing) its underlying claim has little to do with arbitration; it simply attempts to minimize one party's liability to another.

Regardless of how it is labeled, however, this Court has made clear that any prospective-waiver exception extends only to arbitration agreements that require the parties prospectively to waive the ability to assert a cause of action. That is not the case here. Respondents will be able to pursue their FLSA and state-law claims in arbitration, and no one has suggested otherwise. Respondents nevertheless insist that the NLRA precludes enforcement of the arbitration agreement as written (and that the agreement is in fact an unfair labor practice). Nothing in this Court's cases about prospective waivers of statutory causes of action suggests that another federal statute can have that dramatic effect absent a clear congressional command.

4. Respondents further contend that enforcing arbitration agreements according to their terms absent a clear contrary command in another federal statute would

lead to absurdities. Employers would be free, they say, to vary the terms of dispute resolution based on an employee's race, sex, or age. See NLRB Br. 51; Lewis Br. 54; Hobson Br. 50. And parties, they add, could enter into arbitration agreements that violate the antitrust laws with impunity. See Morris Br. 36; Lewis Br. 54.

Those arguments rest on a gross caricature of the clear-congressional-command standard. They assume that a federal statute must yield to the Arbitration Act unless it expressly precludes arbitration altogether. But this Court has already indicated that a federal statute can displace the Arbitration Act if it contains a clear command contrary to *the specific terms* of an arbitration agreement, see *Italian Colors*, 133 S. Ct. at 2309-2310, and no "magic words" are necessary, see *Gilmer*, 500 U.S. at 26. Respondents also assume a false equivalence between a federal statute that permits virtually any arbitration agreement as long as it is offered on a nondiscriminatory basis or is not a naked restraint on trade, and a statute that allegedly prohibits individual arbitration agreements for all employers subject to it. The clear-congressional-command standard allows the Court to draw sensible distinctions among statutes and contexts.

In each case, the relevant inquiry is whether another federal statute contains a clear contrary command that overrides the Arbitration Act's clear command to enforce arbitration agreements according to their terms. There is nothing anomalous about such an inquiry; it is how the reconciliation of potentially conflicting statutes normally works.

B. The NLRA Does Not Contain A Clear Contrary Command To Override The Arbitration Act

As in any other case in which the Arbitration Act allegedly conflicts with another federal statute, respondents bear the burden of showing that the NLRA contains a clear command contrary to the Arbitration Act's command to enforce arbitration agreements according to their terms—including terms that require individual, rather than collective, arbitration. Respondents make little effort to satisfy that standard or to reconcile the two statutes.

Instead, respondents argue at great length that the NLRA, viewed in isolation from the Arbitration Act, provides covered employees with a nonwaivable right to invoke collective-litigation procedures in employment-related disputes—creating, rather than resolving, a conflict between the two statutes. Respondents' effort to evade the applicable test is understandable. The relevant provisions of the NLRA do not address arbitration or contain any other hint of a conflict, let alone the clear contrary command this Court's cases require. And respondents' interpretation of the NLRA is in any event deeply flawed.

1. A federal statute will not displace the Arbitration Act's clear mandate to enforce arbitration agreements according to their terms unless Congress has expressed its intention to do so with "clarity." See *CompuCredit*, 565 U.S. at 103. Courts will thus compel arbitration whenever the arguments concerning the interpretation of the other federal statute are "in equipoise." *Id.* at 109 (Sotomayor, J., concurring in the judgment). Consistent with that standard, "any doubts * * * should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25.

While this Court has repeatedly applied that standard in the specific context of arbitration, it is not unique to it. Whenever two federal statutes allegedly conflict, "it is the duty of the courts, absent a clearly expressed congressional intention to the contrary," to harmonize the statutes if they are "capable of co-existence." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974); see, *e.g.*, *United States* v. *Estate of Romani*, 523 U.S. 517, 530-532 (1998). A merely "plausible" conflict between the statutes will not suffice to prevent harmonization. See *American Bank & Trust Co.* v. *Dallas County*, 463 U.S. 855, 868-869 (1983). Accordingly, when one statute speaks clearly to the issue at hand—as the Arbitration Act does as to the enforcement of arbitration agreements according to their terms—another statute must yield where that statute is ambiguous. See *Branch* v. *Smith*, 538 U.S. 254, 273-275 (2003) (plurality opinion); *West Virginia University Hospitals, Inc.* v. *Casey*, 499 U.S. 83, 100 (1991).

Respondents' attempt to avoid those fundamental principles of statutory interpretation is telling. And under those principles, this is an easy case. Respondents cannot hope to demonstrate that the NLRA contains a clear command precluding agreements to arbitrate on an individual basis. The general language in Section 7's residual clause—which gives employees the right to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U.S.C. 157—cannot do the "heavy lifting" required to evince a clear intent to preclude individual arbitration. *CompuCredit*, 565 U.S. at 100; see EY Br. 27-28. Nor does the legislative history of the NLRA evince such an intent, see EY Br. 29; respondents cite no contrary evidence on point, see, *e.g.*, Morris Br. 20-24; Lewis Br. 16. And individual arbitration does not fundamentally undermine the underlying purposes of the NLRA: namely,

minimizing industrial strife by encouraging self-organization and collective bargaining. See 29 U.S.C. 151; EY Br. 29-32.

Because the NLRA does not reveal a clear congressional command contrary to agreements to arbitrate on an individual basis, the Arbitration Act requires that the arbitration provisions at issue be "rigorously enforce[d] * * * according to their terms." *Italian Colors*, 133 S. Ct. at 2309 (internal quotation marks omitted); see, *e.g.*, *CompuCredit*, 565 U.S. at 104. That should be the end of the matter.

2. Instead of attempting to demonstrate the existence of a clear congressional command, respondents argue that their interpretation of the NLRA is the better one when the statute is read in isolation. Even if that were the correct approach—and it is not—respondents' interpretation founders.

a. Respondents argue that Section 7's residual clause—which gives employees the right to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection"—confers a nonwaivable right to invoke class or other collective procedures in disputes with employers over employment-related claims. See Morris Br. 14-24; NLRB Br. 11-21; Lewis Br. 10-25; Hobson Br. 10-23. But the text and context of Section 7 compel the opposite conclusion. The expressly enumerated rights in Section 7 include the rights to self-organize; form, join, or assist labor organizations; and bargain collectively. See 29 U.S.C. 157. Although respondents suggest otherwise, it is an unremarkable proposition that the residual clause should take meaning from the specific clauses it follows. See, *e.g.*, *Yates* v. *United States*, 135 S. Ct. 1074, 1086 (2015) (plurality opinion).

The right asserted by respondents differs in a key respect from the rights expressly enumerated in Section 7. Those rights all involve actions employees can undertake "on their own collective initiative." *NLRB* v. *Alternative Entertainment, Inc.*, 858 F.3d 393, 414-415 (6th Cir. 2017) (Sutton, J., concurring in part and dissenting in part). But collective-litigation procedures are different: "[t]he use of collective procedures is limited by statute, by the rules of the forum, and * * * by waiver." *Id.* at 415. Accordingly, while Section 7 may protect employees' collective efforts to decide to invoke whatever litigation opportunities are available, it does not guarantee any degree of success (or make any employer effort to defeat that success an unfair labor practice). Put differently, while Section 7 may protect employees who jointly approach the courtroom door, it does not reach into the courtroom and "create an affirmative right to use or pursue [particular] procedures." *Ibid.* That is especially true where, as here, the employees are pursuing individual causes of action for damages under statutes separate from the NLRA—which is hardly litigation for "mutual aid or protection." 29 U.S.C. 157; see EY Br. 42.

Respondents assert that, under the foregoing interpretation, Section 7 would offer no protection for any kind of concerted activity related to employees' actions in the courts. See Morris Br. 19; NLRB Br. 17; Lewis Br. 12-13; Hobson Br. 15. That does not follow. Section 7 may (or may not) protect employees who work together in other ways to pursue employment-related claims. See *Alternative Entertainment*, 858 F.3d at 414-415 (Sutton, J., concurring in part and dissenting in part). Section 7 may even protect employees' ability collectively to decide to avail themselves of individual arbitration simultaneously for the same basic claims. But whatever actions Section 7's residual clause protects, it assuredly

does not confer an affirmative right to invoke collective-litigation procedures created by a separate statute or rule—especially when the employees do not even argue that the statutes providing their causes of action demand collective relief.

b. Respondents contend that various decisions from this Court and the NLRB—most notably, the Court's decision in *Eastex, Inc.* v. *NLRB*, 437 U.S. 556 (1978)—have effectively answered the question presented. See, *e.g.*, NLRB Br. 12-15; Lewis Br. 10-11. Respondents vastly overread those decisions. Although the Court observed in *Eastex* that Section 7 "has been held" to protect employees' "resort to administrative and judicial forums" when "seek[ing] to improve working conditions," it said nothing about arbitration agreements and specifically reserved the question of "what may constitute 'concerted' activities in this context." 437 U.S. at 565-566 & n.15. In any event, this case does not generically involve "resort to administrative and judicial forums"; it involves a purported right to invoke particular procedural mechanisms once *inside* a judicial forum.

The other cases respondents cite are similarly inapposite. Each of those cases involved protected activity undertaken by employees themselves, without any need for approval by a court or agency: specifically, preparing, organizing, or filing a complaint in a court or administrative agency. None of those cases involved a claimed right to use particular procedures in practicing before the court or agency. See, *e.g.*, *NLRB* v. *Moss Planing Mill Co.*, 206 F.2d 557, 560 (4th Cir. 1953); *Harco Trucking, LLC*, 344 N.L.R.B. 478, 478 (2005); *United Parcel Service, Inc.*, 252 N.L.R.B. 1015, 1018 (1980); *Spandsco Oil & Royalty Co.*, 42 N.L.R.B. 942, 949-950 (1942).

c. Respondents further contend that it proves too much to say that Section 7 protects only activities the

employees can undertake on their own. After all, they note, even collective bargaining—an activity that Section 7 expressly protects—requires NLRB involvement; it is not something that employees "just *do*." Lewis Br. 14-15 (citation omitted).

That is true, but if anything it proves petitioners' point. Employees have the right to petition the NLRB to elect a bargaining representative, but it is up to the NLRB to determine how, based on applicable law, the election will proceed. See 29 U.S.C. 159. So too with collective-litigation procedures: employees may have the right to file a complaint and even to *request* collective proceedings, but it is up to the judge or arbitrator to determine how or if, based on applicable law, the case will advance. Employees have no right to *access* collective proceedings in the face of waiver or another valid defense, just as employees have no right to NLRB recognition of a bargaining unit in which the employees lack a "community of interest." *NLRB* v. *Action Automotive, Inc.*, 469 U.S. 490, 494 (1985) (citation omitted).

3. Perhaps recognizing that the NLRA alone does not get them where they want to go, the employee respondents (but not the NLRB) also invoke various provisions of the Norris-LaGuardia Act (NLGA). See Morris Br. 37-40; Lewis Br. 19-25; Hobson Br. 24-28. But those provisions are plainly not within the scope of the questions presented in any of the three cases. See 16-285 Pet. i; 16-300 Pet. i; 16-307 Pet. i; cf. 16-300 Resp. Br. in Support of Pet. i (proposing an additional question concerning those provisions, which the Court did not grant). And respondents' felt need to invoke a different statute only underscores that the NLRA does not provide the clear command this Court's cases require.

In any event, the NLGA adds nothing to respondents' arguments concerning the NLRA. As respondents

concede, "[t]he public policy declared in Section 2 of [the NLGA] provides the same right * * * that is contained in Section 7 of the NLRA." Morris Br. 50; see Lewis Br. 19-20; Hobson Br. 12. And Section 3 simply renders unenforceable contracts that conflict with that public policy. See 29 U.S.C. 103. If Section 7 of the NLRA does not override the Arbitration Act as applied here, then neither do Sections 2 and 3 of the NLGA.

Nor does Section 4 of the NLGA aid respondents. Section 4(d) protects the right of an employee to "aid[] any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court." 29 U.S.C. 104(d). But that provision merely contemplates "aiding" a person who is "participating or interested in" a labor dispute in court—not joining or participating in that dispute oneself through a collective-litigation mechanism.

While Section 4(d) of the NLGA protects activities such as fundraising, testifying, gathering evidence, and mobilizing support, it does not purport to grant employees any procedural rights they do not already possess. Nor does Section 4(d) (or any other provision of the NLGA) suggest that Congress intended "concerted activities for * * * mutual aid or protection" in the later-enacted NLRA to encompass broader rights to invoke collective-litigation procedures notwithstanding defenses; to the contrary, the more specific, but more modest, language of the NLGA suggests the opposite.

4. Respondents contend that Section 7 not only confers a right to invoke collective-litigation procedures, but that it renders that right nonwaivable. See Morris Br. 32-35; NLRB Br. 22-34; Lewis Br. 26-34; Hobson Br. 28-34. That would be an odd result. Labor law is premised upon bargaining, including the exchange of rights and privileges between employers and employees. That is

true in the collective context, see, *e.g.*, *NLRB* v. *City Disposal Systems, Inc.*, 465 U.S. 822, 837 (1984), and it is true in the individual context as well, see, *e.g.*, *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 258 (2009); *J.I. Case Co.* v. *NLRB*, 321 U.S. 332, 336-337 (1944).

Nothing in the NLRA suggests that an individual employee is somehow barred from waiving any right that Section 7 protects. Quite the opposite. As the government notes, if Section 7 can be read to include litigation conduct, it would only be because "the residual phrase can reasonably be construed to cover procedural matters as well as substantive ones." U.S. Br. 27. But procedural rights, such as access to collective-litigation procedures, are typically waivable. See *Italian Colors*, 133 S. Ct. at 2309, 2311 (class-action procedures under Rule 23); *Gilmer*, 500 U.S. at 32 (collective-action procedures under the ADEA); cf. NLRB Br. 52 (suggesting that collective-action procedures under the FLSA, identical to those at issue in *Gilmer*, are waivable).

Unsurprisingly, this Court has held that Section 7 rights that are not central to the collective-bargaining process are not absolute and can be waived. See EY Br. 45 (citing cases). Respondents attempt to distinguish those cases on the ground that they involved the waiver of a Section 7 right by a union, not an individual employee. See NLRB Br. 29-30; Lewis Br. 31 n.6; Hobson Br. 31. But that does not make the cases inapposite. As the Court has explained, a union does not have an absolute right to waive any Section 7 right; instead, a union's ability to waive a Section 7 right of the employees it represents depends on the nature of the right at issue. See *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 705-706 (1983); *NLRB* v. *Magnavox Co.*, 415 U.S. 322, 325-327 (1974).

So too in the context of waiver by an individual, whether a Section 7 right can be waived depends on the nature of the right in question. Here, respondents assert a right to invoke collective-litigation procedures available under non-NLRA statutes and rules. That is the very definition of a procedural right, which individuals "[a]re at liberty to waive." *Harris* v. *Avery Brundage Co.*, 305 U.S. 160, 164 (1938); see, *e.g.*, *Italian Colors*, 133 S. Ct. at 2310-2312; *United States* v. *Mezzanatto*, 513 U.S. 196, 200-203 (1995).

Respondents further contend that, in *J.I. Case*, *supra*, and *National Licorice Co.* v. *NLRB*, 309 U.S. 350 (1940), this Court held that employment contracts involving individual waivers of Section 7 rights gave rise to "unfair labor practice[s]" under Section 8(a)(1) of the NLRA. See Morris Br. 33; NLRB Br. 23-25; Lewis Br. 28-29; Hobson Br. 29-30. But those cases do not stand for the categorical proposition that waivers of Section 7 rights by individual employees are always improper. As the government has explained, *J.I. Case* and *National Licorice* both involved contracts "adopted to eliminate the [u]nion as the collective bargaining agency of [the] employees," U.S. Br. 29 (second alteration in original) (citation omitted); see *National Licorice*, 309 U.S. at 360; *J.I. Case*, 321 U.S. at 337. It is unsurprising that the Court held that *those* waivers were invalid, because the whole purpose of the NLRA is to protect employees' ability to bargain collectively. See 29 U.S.C. 151, 157; *Metropolitan Edison Co.*, 460 U.S. at 705-706.

The NLRB further argues that any Section 7 right to invoke collective-litigation procedures cannot be waived because it is a "public right." NLRB Br. 31. That is incorrect. As this Court has explained, "[i]t is *not* true that any private right that also benefits society cannot be waived." *New York* v. *Hill*, 528 U.S. 110, 117 (2000). In-

stead, only a private right that is *essential* to the public purpose of the provision creating the right is nonwaivable. See *ibid.* Any Section 7 right to invoke collective-litigation procedures could not be considered so central to the NLRA's stated purpose of minimizing industrial strife as to prohibit waiver. See pp. 12-13, *supra*.

Just as the NLRA contains no affirmative indication that it is creating a right to invoke collective-litigation procedures, so too does it reflect no "affirmative indication of Congress' intent to preclude waiver" of such a right. *Mezzanatto*, 513 U.S. at 201. There is thus no reason here to deviate from the principle that employees, like all other parties, have a presumptive right to waive legal protections intended for their benefit. Cf. Lewis Br. 53 n.10 (acknowledging that Section 7 "requires only that a generally available joint procedural device be made available to employees on the same terms as it is made available to everyone else").

5. Unwilling to shoulder their burden to show that the NLRA contains the requisite clear congressional command contrary to the Arbitration Act's mandate to enforce arbitration agreements according to their terms, and unable even to make the (legally irrelevant) showing that the NLRA in isolation creates a nonwaivable right to invoke collective-litigation procedures in employment-related disputes, respondents offer two last-ditch arguments.

a. The employee respondents argue that the Court should defer to the NLRB's interpretation of the NLRA under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See Morris Br. 30-32; Lewis Br. 25-26. Notably, however, the NLRB does not argue for such deference—presumably either because the NLRB's current interpretation is only of recent vintage, or because the NLRB might change its po-

sition before this litigation ends in light of ongoing changes in its membership.* But whatever position the NLRB takes by the time of oral argument, it is not entitled to deference on the question whether the NLRA contains the requisite clear congressional command to override the Arbitration Act (a statute the NLRB does not administer). See EY Br. 48-50; U.S. Br. 23-25.

b. Finally, some of the employee respondents (but again not the NLRB) invoke Section 15 of the Norris-LaGuardia Act, 29 U.S.C. 115, which expressly repeals any conflicting statutes. See Lewis Br. 50; Morris Br. 38-40; Hobson Br. 54. But that adds nothing to the analysis here. A provision that generally states that "all acts or parts of acts in conflict with this act are hereby repealed" "do[es] nothing more than recite an obvious truism" and "should legally be a nullity." 1A Norman J. Singer & J.D. Shambie Singer, *Sutherland on Statutes and Statutory Construction* §§ 20:26, 23:8, at 157, 445 (7th ed. 2014). The presumption against implied repeals still applies even in the presence of such a provision, because the provision does not expressly state which prior statutes it is repealing. See *id.* § 23:8, at 445-447; see *City of Savannah* v. *Kelly*, 108 U.S. 184, 188 (1883).

The same principles governing the harmonization of two potentially conflicting federal statutes thus apply to the NLGA just as they do to the NLRA. And because respondents acknowledge that the NLGA contains the same language and protects the same rights as the NLRA, see pp. 16-17, *supra*, the arbitration provisions at issue here are enforceable.

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* The President has nominated two new members to the five-member NLRB. One nominee was confirmed in August, and the other is currently awaiting Senate approval. The NLRB's general counsel, Richard Griffin, leaves office on November 4.

* * * * *

Respondents have failed to carry their burden of showing that the NLRA contains a clear command contrary to the Arbitration Act's command to enforce arbitration agreements according to their terms—including terms that require individual, rather than collective, arbitration. The NLRA does not evince a clear command contrary to agreements to arbitrate on an individual basis; it says nothing about collective-litigation procedures, and it does not confer a nonwaivable right to invoke those procedures. The Ninth Circuit erred by invalidating the arbitration provision at issue here, and its judgment should therefore be reversed.

Respectfully submitted.

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